S.B.CRIMINAL MISC. PETITION NO.696/2007
(Bheru Singh & Anr. Vs. State of Raj.)

Date of order : : 16.05.2007

HON'BLE MR. KRISHAN KUMAR ACHARYA, J.

Mr.P.N.Mohanani, for the petitioners.
Mr.Ashok Upadhyay, PP for the State.

Issue notice. Mr.Upadhyay, learned Public prosecutor accepts notice on behalf of the State.

By this misc. petition under Section 482 Cr.P.C, the petitioners are challenging the order of learned Judicial Magistrate, First Class, Mandal, District Bhilwara dated 7.1.2007 whereby learned Magistrate has declared the petitioners as absconder and also initiated proceedings under Sections 82 and 83 Cr.P.C.

Learned counsel for the petitioner states that previously, anticipatory bail was granted to the accused-petitioners and thereafter, the police filed challan against them for

offence under Section 341, 353, 379 IPC but they have not received any notice. After filing of the charge-sheet, bailable warrants were issued against the petitioners but the same were not served on the petitioners. Learned Magistrate, however, ordered to issue arrest warrant against the petitioner. Since accused were not found at the place of residence and the arrest warrants issued against the petitioners were not received after due service and therefore, learned Magistrate declared the accused-petitioners as absconder and issued standing arrest warrant against the petitioners. It is contended by learned counsel for the petitioners that before declaring the petitioners as absconder, learned Magistrate should have satisfied himself that accused is avoiding service or he is not residing at his permanent address or there is no chance of his arrest in future. Learned Magistrate should have called the process server and record his statement but learned Magistrate without recording the statement of process server has initiated proceedings under Section 299 Cr.P.C. declaring the petitioners absconder and also initiated proceedings under Section 82 and 83 Cr.P.C A standing arrest warrant has also been issued against the petitioners.

The only request of learned counsel for the petitioner is that the petitioners may be given liberty to surrender before the learned Judicial Magistrate, Mandal and learned Magistrate be directed to decide the bail application of the petitioners in accordance with the law on the same day; and proceedings under Section 82 and 83 Cr.P.C. be dropped.

Learned Public Prosecutor has supported the order of learned Magistrate as well as revisional court and stated that petitioners were granted anticipatory bail and after filing charge-sheet, they were not appearing before the trial court, therefore, learned Magistrate has rightly declared the petitioners as absconder and initiated proceedings under Section 82 and 83 Cr.P.C.

I have considered the arguments advanced by learned counsel for the parties and also gone through the order dated 7.1.2007 passed by learned Judicial Magistrate, First Class, Mandal, District Bhilwara. It appears that learned Magistrate has declared the accused as absconder being without satisfied himself that accused is avoiding service or he had left his permanent

residence or there is no chance of arrest in future. Learned Magistrate has not recorded the statement of process server. When the bailable warrant issued against the accused were received unserved, learned Magistrate should have issued the process again and if accused are absconding or they could not be arrested then learned Magistrate should have called the process server and recorded his statement whether accused are absconding and after being satisfied himself that accused are absconding, he should have declared the accused as absconder.

It is settled proposition of law that before declaring the accused as absconder, the court has to be satisfied that accused had left their permanent residence or they are avoiding service or there is no chance of arrest in near future. Learned Magistrate has not proceeded in accordance with the law. He has further committed illegality that he has consigned the file to the record without recording the evidence. For this, Section 299 Cr.P.C. is very much clear which runs as follows:-

> "**299 Record of evidence in absence of accused.-**(1) If it is proved that an accused person has absconded, and that there is no immediate

> prospect of arresting him, the Court competent to try [or commit for trial,] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

The provision of this Section clearly shows that it was the duty of the court to record the statement of the witnesses under Section 299 Cr.P.C. Learned Magistrate has also consigned the file to the record. This part of the order is also bad in eye of law.

Looking to all the facts and circumstances of the case, the proceedings initiated against the petitioners under Section 82 and 83 Cr.P.C. are hereby dropped. Accused-petitioners, if so wish, may surrender themselves before the learned Judicial Magistrate, Mandal within a period of ten days. Learned Magistrate shall decide the bail application of the petitioner on the same day in accordance with law taking into consideration the fact that previously, the accused were granted

anticipatory bail. The standing arrest warrant issued against the petitioners may be recalled immediately.

With these observations/directions, this misc. petition stands disposed of.

(KRISHAN KUMAR ACHARYA), J.

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